

January 7, 1999



OFFICE OF THE
ATTORNEY GENERAL
STATE OF TEXAS

OR99-0013

Ms. Elaine S. Hengen
Assistant City Attorney
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

— * —
Dear Ms. Hengen:

JOHN CORNYN
Attorney General

— * —
You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 121153.

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The El Paso Police Department (the "department") received two requests for information relating to the Intoxilyzer machines used by the department, vehicle inventory procedures, and radio communications concerning cases in which the requestor's clients were arrested for DWI. You contend that some of the responsive information is excepted from disclosure pursuant to sections 552.027, 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.¹

First, you assert that information responsive to the requests for the Intoxilyzer's computer program is not information that is subject to the act. We agree that a computer program is used "as a tool for the storage, manipulation, and security of other information" and is not the kind of information made public by section 552.021 of the act. Open Records Decision No. 581 at 6 (1990).

¹You inform us that "Exhibit 'F' contains representative samples of the copies of the Intoxilyzer tests results requested in requests nos. 2," and "Exhibit 'G' contains two print-outs which constitute representative samples of the information relating to the maintenance of the Intoxilyzers." In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Next, you state that the training manuals and information responsive to request items 3, 5, 6, 7, 8, 9, and 20 do not exist.² In addition, you explain that you do not have information responsive to request items 11 and 12 concerning Mr. Richard De La Rosa's arrest by the Sheriff's Department. The Open Records Act does not require a governmental body to make available information which does not exist at the time of the request. Open Records Decision No. 362 (1983).

Lastly, you assert that the remaining responsive information is excepted from public disclosure by section 552.103. Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990).

You inform us that the two arrests at issue are pending prosecutions in the county courts at law in El Paso County. You have submitted a letter from the district attorney's office which states that the two cases are set for trial, that the requested information is related to the pending prosecutions, and that the information should be withheld.

We find that the information at issue relates to pending litigation. Under these circumstances, we conclude that the department may withhold the information at issue from disclosure under section 552.103(a). See Open Records Decision Nos. 469 (1987), 141 (1976), 121 (1976).

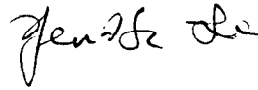
We note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing

²You explain that the comprehensive summary requested in item 9 does not exist, but some programming or manipulation of data is required to produce some of the information. You have notified the requestor of this fact in accordance with section 552.231 of the Government Code.

party in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed.³ Moreover, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref.: ID# 121153

Enc.: Submitted documents

cc: Mr. Robert S. Anchondo
Attorney at Law
3100 East Yandell Drive
El Paso, Texas 79903
(w/o enclosures)

³ Although section 552.103 provides that the litigation interest to withhold information ends once the records have been disclosed to defense counsel, the department still has a law enforcement interest for withholding the information in Exhibit F. See Open Records Decision No. 579 (1990) (providing information to opposing party in informal discovery is not selective disclosure for purposes of section 552.007). Thus, if the opposing party has had access to any documents in Exhibit F, the department may withhold such information under Government Code section 552.108(a)(1). You have shown that release of such information would interfere with the detection, investigation, or prosecution of crime by stating that the records relate to other ongoing criminal investigations. See Open Records Decision No. 216 (1978).